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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

No. 1068-1069

ILLINOIS NORTHERN UTILITIES COMPANY,
Petitioner,

vs.

CITY OF GENESEO, ILLINOIS, AND ILLINOIS COMMERCE COMMISSION,
Respondents.

CENTRAL ILLINOIS ELECTRIC AND GAS COMPANY,
Petitioner,

vs.

VILLAGE OF HEYWORTH, ILLINOIS, AND ILLINOIS COMMERCE COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS AND BRIEF IN SUPPORT THEREOF.

DAVID F. TABER,
Attorney for Illinois Northern Utilities Company, Petitioner.
CLAUDE A. ROTH,
Attorney for Central Illinois Electric and Gas Company, Petitioner.

ISHAM, LINCOLN & BEALE,
WILSON & MCILVAINE,
DIXON, DEVINE, BRACKEN & DIXON,
HENRY WATERMAN,
GOTTLIEB & SCHWARTZ,
Of Counsel.

THE SUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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B. Petitioners have not been afforded an opportunity to be heard on the judicial questions of whether the Cities and Villages Act granted power of ouster to Geneseo and Heyworth and of whether, if granted, the Public Utilities Act repealed such power because the Commission, as the trial tribunal, had no jurisdiction and in fact was precluded by the decisions of the Supreme Court from exercising jurisdiction to entertain or determine these judicial questions.

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A. Petitioners' circuit court judgments, entered on authority of the first Geneseo case confirmed in them the right to continue utility operations in the streets of respondents. The Supreme Court in deciding that Heyworth and Geneseo have the power to oust petitioners has thereby annulled those judgments. This has been done without jurisdiction and in an arbitrary manner.

B. Petitioners have had no opportunity to be heard or to present their defenses with respect to the validity and scope of the prior judgments in the Geneseo and Heyworth ouster suits. Those questions were not before the Commission and no evidence with respect to those prior cases and pleadings therein and the issues formed by said pleadings was or could have been presented to the Commission or was before the Supreme Court of Illinois, which was empowered to act solely on the record made before the Commission.

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CENTRAL ILLINOIS ELECTRIC AND GAS COMPANY,
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vs.

VILLAGE OF HEYWORTH, ILLINOIS, AND ILLINOIS COMMERCE COMMISSION,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your petitioners, Illinois Northern Utilities Company (hereinafter sometimes referred to as "Northern") and Central Illinois Electric and Gas Company (hereinafter sometimes referred to as "Central") petition this Court for a writ of certiorari to review a judgment of the Supreme Court of Illinois reversing and remanding judgments of two circuit courts of Illinois which affirmed orders of the Illinois Commerce Commission dismissing complaints against petitioners, and in support of this petition respectfully show:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

The Parties to the Proceeding.

Petitioners are public utility operating companies furnishing electricity and other utility services wholly within Illinois. Respondents, City of Geneseo (hereinafter sometimes referred to as "Geneseo") and Village of Heyworth (hereinafter sometimes referred to as "Heyworth") are Illinois municipalities, the former having been incorporated in 1865 under a special charter from the Illinois Legislature and the latter deriving its municipal powers from the Cities and Villages Act of Illinois (Ill. Rev. Stat. 1941, ch. 24). Respondent, Illinois Commerce Commission (hereinafter sometimes referred to as "Commission") is an administrative body created by the Public Utilities Act of Illinois (Ill. Rev. Stat. 1941, ch. 111⅔) and is vested by that act with broad and comprehensive powers of regulation, supervision and control of public utilities and their instrumentalities. Petitioners hold certificates of convenience and necessity under said Public Utilities Act from the Commission to operate integrated utility systems in furnishing electricity for public use within the respondent municipalities and within unincorporated territory and other municipalities in the same general vicinity within the State of Illinois.

Previous to the filing with the Commission of the complaints which culminated in the final judgment sought to be reviewed by this petition, Geneseo and Heyworth had instituted in the Circuit Courts of Henry and McLean Counties ouster suits against Northern and Central for mandatory injunctions to compel Northern and Central to

vacate their streets and to cease furnishing electricity within their corporate limits. The circumstances leading to the filing of the ouster suits and the rights adjudicated by the judgments rendered therein are as follows.

The Judgment Obtained by Northern in Judicial Proceedings in Illinois.

In 1923 Geneseo, by ordinance, granted to Northern the right to occupy its streets and furnish electric service for a period of ten years. When that ordinance expired in 1933 Northern declined to remove its equipment and continued to furnish electric service in Geneseo. Thereupon, Geneseo passed an ouster ordinance directing Northern to vacate the streets. Suit was filed by Geneseo in the Circuit Court of Henry County to enforce that ouster ordinance. The prayer of Geneseo's complaint was that a mandatory injunction issue directing Northern to remove its equipment from the streets. The circuit court upheld the ouster ordinance as valid and granted the mandatory injunction, after first sustaining Geneseo's motion to strike the answer of Northern. Northern took an appeal directly to the Supreme Court of Illinois on the ground that the validity of an ordinance was involved, namely the ouster ordinance. (Ill. Rev. Stat. 1941, ch. 110, § 199.) That court reversed the decree of the circuit court and remanded the cause, with directions to overrule the motion to strike the answer of Northern. *City of Geneseo* v. *Illinois Northern Utilities Co.*, 363 Ill. 89. (Rec. 301.) That decision is sometimes hereinafter referred to as the "first Geneseo case".

The decision of the Supreme Court held in that case that the provisions of the Public Utilities Act had withdrawn from municipalities the power which they had previously exercised in relation to the use of the streets by public utilities and had conferred such power upon the Com-

mission; that franchise ordinances in so far as they interfere with the Commission in the exercise of the regulatory powers granted it by the Public Utilities Act were abrogated; and that Geneseo had no power to enact the ouster ordinance and was without legal power and authority to maintain the suit.

The Circuit Court of Henry County, on remandment, overruled the motion to strike the answer pursuant to the judgment and mandate of the Supreme Court of Illinois, and, on bill and answer, entered a judgment in favor of Northern dismissing Geneseo's suit (Rec. 31). That judgment has never been reversed, modified or annulled except by the judgment herein sought to be reviewed.

The Judgment Obtained by Central in the Circuit Court of McLean County, Illinois.

In 1907 Heyworth, by ordinance, granted to Central the right to occupy the streets of Heyworth and to furnish electric service therein. In 1932 this ordinance expired, and Central declined to remove its equipment and continued to furnish electric service in Heyworth.

Heyworth also passed an ouster ordinance directing Central to vacate the streets. Suit was instituted by Heyworth in the Circuit Court of McLean County to enforce the ouster ordinance. Heyworth prayed in its complaint that a mandatory injunction issue directing Central to remove its equipment from the streets. Before final decree was entered in this case, but after hearing, the Supreme Court of Illinois decided the first Geneseo case.

In an opinion dated October 31, 1936, the Circuit Court of McLean County considered the right of Heyworth to a mandatory injunction ousting Central, and said (Rec. 119):

> "The first question, that of the ouster of the Central Company, can be disposed of in a few words. Subsequent to the institution of this action by the Village

of Heyworth the Supreme Court of this State has had occasion to pass upon the identical question. In the case of *City of Geneseo* v. *Illinois Northern Utilities Co.*, 363 Ill. 89, it was held in effect that by virtue of the provisions of the Public Utilities Act of 1921 a municipality had been deprived of any right to exercise control over the instrumentality of a public utility occupying the streets thereof, but that such questions were now within the exclusive jurisdiction of the Illinois Commerce Commission. By virtue of the recent statement of the Supreme Court the relief sought by * * * Heyworth * * * cannot be granted. * * *"

On November 2, 1936, that court gave judgment in favor of Central and dismissed the complaint of Heyworth (Rec. 119). This judgment was never taken to a higher court and it has never been reversed, modified or annulled except by the judgment herein sought to be reviewed.

The Proceedings Sought to Be Reviewed.

After the above mentioned unsuccessful attempts to maintain ouster proceedings against petitioners in the courts, respondents filed identical complaints with the Commission, an administrative body having no judicial powers.* These complaints asked the Commission to order petitioners to remove their facilities from respondents' streets and to discontinue their electric serv-

* Such jurisdiction as the Commission has of complaints exists by virtue of Section 64 of the Public Utilities Act wherein it is provided that "complaint may be made by any person * * * or municipal corporation by petition or complaint in writing setting forth any act or things done or omitted to be done in violation, or claimed to be in violation, of any provisions of this Act, or of any rule or order of the Commission." (Ill. Rev. Stat. ch. 111⅔, § 68.)

The limited jurisdiction of the Illinois courts to review an order of the Commission exists by virtue of Section 68 of the Public Utilities Act wherein it is provided that any person affected may within specified time limits appeal to the courts "for the purpose of having the reasonableness or lawfulness of the rule, regulation, order or decision inquired into and determined" and that "no new or additional evidence may be introduced in any proceeding upon appeal * * * but the appeal shall be heard on the record of the commission" and, further, that "a rule, regulation, order or decision of the commission shall not be set aside unless it clearly appears that the finding was against the manifest weight of the evidence * * * or that the same [order] was without the jurisdiction of the Commission." (Ill. Rev. Stat. 1941, ch. 111⅔, § 72.)

ice (Rec. 1, 71). The grounds upon which respondents based their claim for this relief were that petitioners' ordinances had expired; that respondents had installed municipal plants capable of supplying the electrical requirements of the public within the municipalities; that respondents had passed ordinances ordering petitioners out of the municipalities which they refused to obey; and that the presence and operation of petitioners' facilities caused a wasteful condition and were detrimental to the business of the municipal plants.

In their answers petitioners asserted that the public interest would be injuriously affected by orders requiring them to cease operations in the municipalities; that they were operating in each of the municipalities by virtue of certificates of public convenience and necessity from the Commission and had in nowise violated the terms of said certificates or any order or rule of the Illinois Commission, or any requirement of the Public Utilities Act (Rec. 5, 75, 82).

After hearing, the Commission entered orders dismissing the complaints of Geneseo and Heyworth (Rec. 42, 128). In each of the two orders the Commission stated that it conceived "the effect of the Supreme Court decision in the *Geneseo* case to be that the question of whether or not a public utility should discontinue service in a municipality after the expiration of its ordinance is a matter to be determined by this Commission and that such determination should be made in accordance with the just and reasonable requirements of public convenience and necessity, that is, whether or not the respondent public utility now serves a useful purpose" in the municipality, as contemplated by the Public Utilities Act. The orders found, in substance, that the public interest would not be served by ordering petitioners to remove their facilities and discontinue utility operations in the municipalities (Rec. 50, 53, 136, 139).

These orders were appealed to the Circuit Courts of Henry and McLean Counties, respectively, for the purpose of having their reasonableness or lawfulness determined under section 68 of the Public Utilities Act (Ill. Rev. Stat. 1941, ch. 111⅔, §72). These courts affirmed the orders (Rec. 62, 146).

Thereupon Geneseo and Heyworth appealed the affirming orders of the circuit courts directly to the Supreme Court of Illinois under section 69 of the Public Utilities Act (Ill. Rev. Stat. 1941, ch. 111⅔, § 73). On April 10, 1941, that court rendered its first opinion (Rec. 157) in which it stated that it had re-examined the decision in the first Geneseo case; that that decision was not consistent with the then views of the court and to that extent was overruled. The decision held that the Cities and Villages Act granted to Geneseo and Heyworth the power to oust Northern and Central and that the Public Utilities Act had not repealed such grant.

The decision of the Supreme Court rendered April 10, 1941, was that the orders of the circuit courts be reversed and the respective causes be remanded, with directions to proceed in conformity with the views expressed in the opinion. The effect of that decision would have been to enforce a power in Geneseo and Heyworth to oust Northern and Central, the very thing which the judgments in the prior ouster suits had determined Geneseo and Heyworth had no power to do.

Petitioners filed a petition for rehearing in which they specifically set forth and claimed that the decision of April 10, 1941, violated the rights guaranteed to them by the Fourteenth Amendment in that said decision operated to annul the judgments in the former ouster suits and that said decision, without the court having jurisdiction and without affording petitioners an opportunity to be heard and present their defenses, held that the Cities and

Villages Act granted the power of ouster to Geneseo and Heyworth and that the Public Utilities Act did not repeal such grant (Rec. 163).

The Attorney General of the State of Illinois, who, by the provisions of the Public Utilities Act is required to represent the Commission and defend its orders and decisions in all appeals therefrom (Ill. Rev. Stat. 1941, ch. 111⅔, § 72a) also filed a petition for rehearing urging, among other things, that the Commission had approved the issuance by utilities of millions of dollars in securities in reliance upon the court's prior decision in the first Geneseo case, and that the reversal by the court of its position as pronounced in that decision would restrict the financing of public utilities within the State of Illinois and interfere with the power of the Commission to require extensions and additions to their plants and affect, to the public detriment, the rates of the utilities of the State (Rec. 161).

The applications for rehearing were granted on June 18, 1941 (Rec. 177).

On November 24, 1941 (Rec. 249) the judgment herein sought to be reviewed was entered by the Supreme Court of Illinois (two Justices dissenting) reversing the judgments of the Circuit Courts of Henry and McLean Counties, and remanding the causes to said courts with directions to remand to the Commission to enter orders in each case in accordance with the views expressed in the opinion accompanying the judgment (Rec. 269).

This decision of November 24, 1941, holds that the judgments in the former ouster suits did not adjudicate the issues of whether the Cities and Villages Act granted power of ouster to Geneseo and Heyworth and of whether the Public Utilities Act had repealed such grant. It holds that there were three issues presented in the first Geneseo case, two of which concerned the jurisdiction of the circuit court

of the ouster suit and the third of which involved the power of Geneseo to enforce ouster.

It holds that only the third issue would prevent any further action by Geneseo to enforce ouster and that since the court was unable to tell on which issue the judgment was based, the first Geneseo case was not conclusive of the right of Geneseo and Heyworth to enforce ouster. The decision further holds that the Cities and Villages Act granted power of ouster to Geneseo and Heyworth and that such grant was not repealed by the Public Utilities Act.

The effect of the decision is to hold that Geneseo and Heyworth have the power to enforce ouster against petitioners, the very issue which had been decided to the contrary in each of the prior ouster suits.

On November 25, 1941, petitioners filed a motion with the Supreme Court to stay the mandate and for leave to file suggestions for a reconsideration of the opinion of November 24, 1941 (Rec. 271, 274). The suggestions for reconsideration were submitted to the court. The suggestions specifically set up and claimed that the decision deprives petitioners of their property in violation of due process because failing in the primary requirements of jurisdiction and an opportunity to be heard.

The suggestions also claimed that the decision was arbitrary in holding: (1) that the Cities and Villages Act applied to Geneseo, a special charter city not controlled by the Cities and Villages Act; (2) that the first Geneseo case was determinative of Central's immunity from ouster by Heyworth, and (3) that two of the three issues in the first Geneseo case involved the jurisdiction of the Circuit Court (Rec. 274, 283-287).

This motion was denied on January 22, 1942 (Rec. 297).

II.

BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925, 28 U. S. C. A. § 344(b).

The Supreme Court of Illinois is the highest court of Illinois in which a decision in this case could be had. The decision sought to be reviewed was entered November 24, 1941, and on February 6, 1942, an extension of time was granted to petitioners by Mr. Associate Justice Byrnes to and including March 24, 1942, within which to file this petition for a writ of certiorari (Rec. 308).

The decision herein of the Supreme Court of Illinois is a final judgment. *Rio Grande Ry.* v. *Stringham*, 239 U. S. 44, 47; *Chesapeake & Potomac Tel. Co.* v. *Manning*, 186 U. S. 238, 240.

The Commission is an administrative agency. Its functions concern only matters of public convenience and necessity, and public convenience and necessity was the only criterion on which it could entertain and determine the present complaints. It was on the finding that public convenience and necessity did not warrant discontinuance of petitioners' services in Geneseo and Heyworth that the Commission entered the orders dismissing the complaints. When these orders came before the Supreme Court on review, that court ignored the record made before the Commission on public convenience and necessity and did not consider whether the Commission's findings thereon had substantial support in the evidence. The court substituted for the administrative question of public convenience and necessity the purely judicial questions, namely, whether petitioners could be divested of rights obtained by them

under the circuit court judgments in the ouster suits, whether the Cities and Villages Act granted the power of ouster to Geneseo and Heyworth and, if granted, whether such grant was repealed by the Public Utilities Act, which issues were outside the scope of the jurisdiction of the Commission.

Petitioners specifically set up and claimed in their answers before the Commission that their certificates of convenience and necessity constituted valuable property rights and that to divest them of such rights on the basis of the complaints of the respondent municipalities would be to deprive petitioners of their property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States.

Petitioners specifically set up and claimed before the Supreme Court of Illinois that the judgment of that court herein sought to be reviewed deprived petitioners of their property in violation of the due process clause of the Fourteenth Amendment, in that:

A. The right of petitioners, under their certificates of convenience and necessity and under their judgments in the former ouster suits, to furnish electricity in Geneseo and Heyworth and to operate electric facilities situated in the streets in Geneseo and Heyworth, until found by the Commission that their so doing was not consistent with public convenience and necessity, is "property" within the protection of the Fourteenth Amendment.

B. The circuit court judgments obtained by petitioners on the authority of the first Geneseo case, 363 Ill. 89, confirmed in them the right to continue their utility operations in the streets of the municipalities after the expiration of their franchise ordinances and such right constitutes a property right under the protection of the due process clause of the Fourteenth Amendment. The Supreme Court of Illinois, in holding by its decision in this case, that a municipality has the power to oust the utility from its streets after the expiration of its franchise ordinance and in directing

that the Commission enforce the ouster ordinances of Geneseo and Heyworth has annulled the circuit court judgments. These judgments could in no wise be an issue in these proceedings and the Supreme Court of Illinois could annul those judgments only in a mode provided by law. The Supreme Court lacked jurisdiction to annul the judgments in these proceedings.

C. The Supreme Court of Illinois in these proceedings has only the limited jurisdiction conferred upon it by the Public Utilities Act to ascertain and determine, on the basis of the record before the Commission, the reasonableness and lawfulness of the Commission's order, and, when acting pursuant to such restricted authorization, is wholly wanting in jurisdiction to adjudicate the issue of whether the Cities and Villages Act granted power to Geneseo and Heyworth to oust petitioners, or to adjudicate the issue of whether the Public Utilities Act repealed such grant, neither of those issues being a question within the jurisdiction of the Commission or determined by the order of the Commission or embodied in the record under review by the court.

D. The questions of whether the Cities and Villages Act granted to Geneseo and Heyworth the power to oust petitioners and whether, if granted, the Public Utilities Act repealed such power, and the question of the validity of the prior judgments in the Geneseo and Heyworth ouster suits were not within the jurisdiction of the Commission to entertain or determine and consequently petitioners have had no opportunity to be heard or present their defenses with respect to those questions; the review by the court being confined to the record made before the Commission.

Petitioners specifically set up and claimed the protection of the due process clause of the Fourteenth Amendment with respect to the foregoing federal questions in their answers before the Commission (Rec. 12, 86), in their petition for rehearing (Rec. 163, 165, 166, 173, 174), in their answer to the reply to the petition for rehearing

(Rec. 221, 225-228, 240-246), and in their suggestions for reconsideration by the court of its judgment (Rec. 275, 283-287). The first opportunity to raise the federal questions with respect to the power of the Supreme Court of Illinois in reviewing the orders of the Commission arose after the Supreme Court had rendered its first decision and therefore those questions were first urged in the petition for rehearing.

This case could be decided only by deciding the foregoing federal questions. By its decision the court held against petitioners on each of these questions.

III.

QUESTIONS PRESENTED.

Are the due process primary requirements of jurisdiction and hearing violated where the Supreme Court of Illinois, vested only with power to determine, on the basis of the record before the Commission, the reasonableness or lawfulness of the Commission's order, holds that the Cities and Villages Act grants power to Geneseo and Heyworth to oust petitioners, when that issue was not made by the record before the Commission, and under the then prevailing law could not have been entertained or determined by the Commission?

Does the judgment of the Supreme Court sought to be reviewed deprive petitioners of their property rights vested in them by their judgments in the former ouster suits? If so, did the Supreme Court have jurisdiction?

IV.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

So far as we have been able to discover by a careful search of the reported cases, this Court has had no previous occasion to determine the precise questions here presented.

The issues determined by the decision sought to be reviewed and which petitioners claim were determined without due process, detrimentally affect not only the rights of petitioners, but the rights of all utilities in the State of Illinois, their customers and security holders. Mr. Justice Stone of the Supreme Court of Illinois, dissenting in this case, said that the decision of the court would subject the investment of purchasers of utility bonds to a drastic "shrinkage in value." (Rec. 270.) The Attorney General of the State of Illinois expressed the same views in his petition for rehearing. (Rec. 161, 162.)

The jurisdiction of the Supreme Court of Illinois to review an order of the Commission is conferred by the Public Utilities Act and is limited to the power to ascertain and determine the reasonableness and lawfulness of the order on the record made before the Commission. Upon the review of the Commission's orders involved in this case, the Supreme Court, instead of confining itself to the reasonableness or lawfulness of the Commission's orders upon the records made before the Commission, entertained and decided the legal questions of whether the Cities and Villages Act granted power of ouster to Geneseo and Heyworth, whether the Public Utilities Act repealed such grant, and whether the judgments in the former ouster suits were valid. The decision of the Supreme Court is

that the Cities and Villages Act granted power of ouster to Geneseo and Heyworth; that the Public Utilities Act did not repeal such grant and that the judgments in the former ouster suits are invalid.

The primary requirements of due process must necessarily lie at the very foundation of review by courts of orders of administrative bodies. By deciding this case as it has the Supreme Court of Illinois has violated the primary requirements of due process and its decision is contrary to principles announced in decisions of this Court. Parties are permitted to try their cases before administrative bodies only upon issues over which such bodies have jurisdiction. On a court review of the record covering the evidence on issues heard and decided by the administrative body, parties are entitled to the safeguards of due process of law against the injection into the case on review of issues which the parties have not had an opportunity to be heard upon below.

This Court has held that at the threshhold of due process of law, as guaranteed by the Fourteenth Amendment, is the question of jurisdiction, and if that does not exist, there is no due process. *Illinois Natural Gas Co.* v. *Central Ill. Pub. Ser. Co.*, 314 U. S. ....; *Twining* v. *New Jersey*, 211 U. S. 78, 111; *Andrews* v. *Andrews*, 188 U. S. 14; *Scott* v. *McNeal*, 154 U. S. 34, 46.

This Court has also held that the due process requirement of an opportunity to be heard and present defenses is violated where a court decides an issue outside of the record and on which, because of the limited jurisdiction of the trial tribunal, presentation of evidence and consideration of the issue were prohibited. *Brinkerhoff-Faris* v. *Hill*, 281 U. S. 673, 681; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 426; *Reynolds* v. *Stockton*, 140 U. S. 254, 266, 268; *Windsor* v. *McVeigh*, 93 U. S. 274, 282.

This Court has further held that due process precludes re-examination, modification or annulment of a judgment rendered by a court of competent jurisdiction in litigation between the same parties, except in a mode provided by law. *McCullough* v. *Virginia,* 172 U. S. 102; *Garrison* v. *City of New York, etc.,* 21 Wall. 196.

WHEREFORE, your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Supreme Court of the State of Illinois, commanding that court to certify and send to this Court a full and complete transcript of the record and of the proceedings in said court in the consolidated cause numbered and entitled on its docket as Nos. 25930 and 25933, *City of Geneseo, Illinois, Appellant* v. *Illinois Northern Utilities Company, Appellee,* and *Village of Heyworth, Illinois, Appellant* v. *Central Illinois Electric and Gas Company, Appellee,* to the end that this cause may be reviewed and determined by this Court as provided by the statutes of the United States; and that said judgment of the Supreme Court of Illinois may be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated March 23, 1942.

DAVID F. TABER,
Attorney for Petitioner, Illinois Northern Utilities Company,

CLAUDE A. ROTH,
Attorney for Petitioner, Central Illinois Electric and Gas Company.

ISHAM, LINCOLN & BEALE,
WILSON & MCILVAINE,
DIXON, DEVINE, BRACKEN & DIXON,
HENRY WATERMAN,
GOTTLIEB & SCHWARTZ,
Of Counsel.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion of Court Below.

(Majority and Dissenting Opinion.)

The opinion of the Supreme Court of Illinois (Rec. 249) is reported in 378 Ill. 506. (Advance sheets.)

Jurisdiction.

The jurisdiction of this Court is based upon section 237(b) of the Judicial Code, as amended by the Act of February 13, 1925. 28 U. S. C. A. § 344(b).

The judgment of the Supreme Court of Illinois was entered November 24, 1941 and on February 6, 1942 an extension of time was granted by Mr. Associate Justice Byrnes to petitioners to and including March 24, 1942 within which to file the petition for a writ of certiorari.

A statement particularly disclosing the basis upon which petitioners contend this court has jurisdiction is set forth in the preceding petition (pp. 10-13).

Statement of the Case.

This has already been stated in the preceding petition under I (pp. 2-9) which is hereby adopted and incorporated in this brief.

Specification of Errors.

The preceding petition sufficiently specifies the errors relied on by petitioner (pp. 11-13).

Summary of the Argument.

I.

A. No jurisdiction existed in the Commission to entertain or determine the purely judicial issues on which the Supreme Court of Illinois on review predicated its decision. Such issues were not relevant to any question properly before the Commission. Determination by the court of issues not made by the record before the Commission, violates the due process requirements of the Fourteenth Amendment that the court have jurisdiction.

B. Petitioners have not been afforded an opportunity to be heard on the judicial questions of whether the Cities and Villages Act granted power of ouster to Geneseo and Heyworth and of whether, if granted, the Public Utilities Act repealed such power because the Commission, as the trial tribunal, had no jurisdiction and in fact was precluded by the decisions of the Supreme Court from exercising jurisdiction to entertain or determine these judicial questions.

II.

A. Petitioners' circuit court judgments, entered on authority of the first Geneseo case, confirmed in them the right to continue utility operations in the streets of respondents. The Supreme Court in deciding that Heyworth and Geneseo have the power to oust petitioners has thereby annulled those judgments. This has been done without jurisdiction and in an arbitrary manner.

B. Petitioners have had no opportunity to be heard or to present their defenses with respect to the validity and scope of the prior judgments in the Geneseo and Heyworth ouster suits. Those questions were not before the Commission and no evidence with respect to those prior cases

and pleadings therein and the issues formed by said pleadings was or could have been presented to the Commission or was before the Supreme Court of Illinois, which was empowered to act solely on the record made before the Commission.

Argument.

I.

The decision of the Supreme Court of Illinois directs that the Commission order petitioners to remove their electric facilities from the streets of, and to discontinue furnishing electricity in Geneseo and Heyworth. This is predicated on the holding by the court that the Cities and Villages Act granted power to Geneseo and Heyworth to oust petitioners, that the Public Utilities Act did not repeal that grant, and further, that the former ouster suits did not adjudicate that Geneseo and Heyworth had no power to oust petitioners.

We contend that these holdings were made by the court without jurisdiction and without affording petitioners an opportunity to be heard and present their defenses and so violated the rights of due process guaranteed to petitioners by the Fourteenth Amendment.

We claim that the Commission possessed no power to entertain or determine these judicial questions and that the Supreme Court had no power to inject these issues into the record made before the Commission.

The Commission is a statutory creature and possesses only those powers conferred upon it by the legislature. The jurisdiction of the Commission to entertain a complaint is found in Section 64 of the Public Utilities Act where it is provided:

> "Complaint may be made * * * by petition or complaint in writing, setting forth any act or things done or omitted to be done in violation, or claimed to be in violation, of any provision of this Act, or of any order or rule of the Commission."

Up to the date of the present decision of the Supreme Court the provisions of the Public Utilities Act had been

repeatedly construed to contain no grant of power to the Commission to entertain or determine a judicial question. *Utilities Commission* v. *Okaw Valley Mut. Tel. Ass'n*, 282 Ill. 336, 340, 342; *People* v. *Peoria & Pekin Union Ry. Co.*, 273 Ill. 440, 445, 446; *Barry* v. *Commonwealth Edison Co.*, 374 Ill. 473, 477, 478: *Lowden* v. *Commerce Commission*, 376 Ill. 225, 230.

The law was also well settled in Illinois, up to the present decision, that the interpretation of statutes to determine the existence and extent of powers granted was a judicial function susceptible of performance only by the exercise of judicial power; more specifically, whether a later act of the legislature repealed an earlier one, and if so, to what extent, was a judicial question. *Merlo* v. *Big Muddy Coal & Mining Co.*, 258 Ill. 328, 334; *People* v. *Bruner*, 343 Ill. 146, 158.

The questions of whether the Cities and Villages Act granted power of ouster, of whether the Public Utilities Act repealed such grant, of whether the judgments of the former ouster suits adjudicated that Geneseo and Heyworth lacked power of ouster were in no respect implicit in or relevant to the question of convenience and necessity the Commission was called upon to decide in this case.

The provisions of the Public Utilities Act, and the powers of the Commission conferred thereby, operate exclusively upon public utilities. In this respect, the provisions of the Public Utilities Act are similar to the provisions of the Interstate Commerce Commission Act, and this Court has held that the Interstate Commerce Commission is not concerned with judicial questions, even though they relate to an administrative matter before it. *New York Central Securities Co.* v. *U. S.*, 287 U. S. 12, 26; *Claiborne-Annapolis Ferry* v. *U. S.*, 285 U. S. 382, 391; *Cleveland, C. C. & St. L. Ry. Co.* v. *U. S.*, 275 U. S. 404, 413, 414.

Typical of these last mentioned cases is the Claiborne-Annapolis Ferry case, where in answer to the contention that the certificate of convenience and necessity granted by the Interstate Commerce Commission was void because the evidence before the Commission showed that the carrier lacked corporate power to exercise the certificate, this Court said (page 391):

> "Whether the Railway Company has corporate power to operate the proposed ferry is a question which cannot be considered in this proceeding."

We contend that the provisions of the Public Utilities Act and the decisions of the Supreme Court prior to the present decision precluded the Commission from entertaining or determining the purely judicial issues decided by the court and that under this state of the law there was no opportunity afforded to petitioners, as required by due process, to be heard and present their defenses on these judicial questions to the trial tribunal, which in this case was the Commission. *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 681.

When the orders of the Commission were before the Supreme Court on review the only jurisdiction the court had in the premises was that vested in it by the Public Utilities Act to ascertain and determine the reasonableness and lawfulness of the orders of the Commission on the record made before the Commission. The Supreme Court itself, subsequent to the time these cases were heard by the Commission, had held that the court in reviewing an order of the Commission cannot entertain a question that was beyond the jurisdiction of the Commission itself to entertain. In *Barry* v. *Commonwealth Edison Co., supra*, decided October 11, 1940, rehearing denied December 4, 1940, the court said (page 479):

> "It is also urged that appellant should have appealed from the order of the commission to the Circuit Court under section 68 (par. 72) of the Public Utilities

> act, but under this section the Court could not have passed upon any question beyond the jurisdiction of the commission, but was required to decide it solely upon the record certified by the commission."

It would seem to be clear that the grant of jurisdiction to the court to determine the "lawfulness" of an order of the Commission on the record made before the Commission necessarily confines the inquiry to questions properly before the Commission. Otherwise, the court could, on review, adjudicate issues on which there had been no hearing.

Petitioners appreciate the weight and finality which this Court properly accords to the interpretation by the supreme court of a state of the statutes and constitution of that state. Here, however, the Supreme Court of Illinois in construing the Cities and Villages Act, the Public Utilities Act, and the judgments in the former ouster suits violated the requirements of jurisdiction and a hearing guaranteed by the Fourteenth Amendment. We submit that the rule of law applicable here is that pronounced by Mr. Justice Reed in the recent case of *Stoll* v. *Gottlieb*, 305 U. S. 165, 171, where he stated:

> "A court does not have the power, by judicial fiat, to extend its jurisdiction over matters beyond the scope of the authority granted to it by its creators".

At the threshhold of due process of law, as guaranteed by the Fourteenth Amendment, is the question of jurisdiction, and if that does not exist, there is no due process. *Illinois Natural Gas Co.* v. *Central Ill. Pub. Serv. Co.*, 314 U. S. ....; *Twining* v. *New Jersey*, 211 U. S. 78, 111; *Andrews* v. *Andrews*, 188 U. S. 14; *Scott* v. *McNeal*, 154 U. S. 34, 46.

The due process requirement of an opportunity to be heard and to present defenses is violated where a court decides an issue outside of the record and on which, because of the limited jurisdiction of the trial tribunal, pres-

entation of evidence and consideration of the issues are prohibited. *Brinkerhoff-Faris* v. *Hill*, 281 U. S. 673, 681; *Coe* v. *Armour Fertilizer Works*, 237 U. S. 413, 426; *Reynolds* v. *Stockton*, 140 U. S. 254, 266, 268; *Windsor* v. *McVeigh*, 93 U. S. 274, 282.

II.

The circuit court judgments entered in the former ouster suits confirmed in petitioners valuable property rights. These judgments were entered on the authority of the first Geneseo case. An analysis of the opinion in the first Geneseo case demonstrates the scope and effect of these judgments and that the case was decided on the merits. The treatment of the case by the decision sought to be reviewed is so arbitrary and unsupportable as to deprive petitioners of substantial property rights; in other words, the Supreme Court in these proceedings annulled these judgments without jurisdiction.

At all times in question petitioners had certificates of convenience and necessity. Under these certificates rights were acquired pursuant to Section 55 of the Public Utilities Act (Ill. Rev. Stat. 1941, ch. 111⅔, § 56). This Court decided in *Frost* v. *Corporation Commission of the State of Oklahoma*, 278 U. S. 515, that a certificate of convenience and necessity constitutes a franchise granted by the state in consideration of the performance of a public service and, as such, constitutes a property right within the protection of the Fourteenth Amendment.

Petitioners were afforded no opportunity in the course of the proceedings resulting in the decision sought to be reviewed to introduce in evidence the pleadings in the former ouster suits by which the issues in those suits and the scope of the judgments entered thereon were specifically defined. By virtue of this limitation we are confined in our

analysis of the decision in the first Geneseo case to a consideration of the statements contained in the opinion in that case.

From the opinion in the first Geneseo case, it appears that the complaint alleged that the franchise ordinance of Northern had expired and that the city, by ordinance, had directed the utility to remove its equipment from the streets, and it prayed a mandatory injunction requiring such removal. The utility answered that it was operating under the Public Utilities Act within the jurisdiction of the Commission; that the Act prohibited it without the consent of the Commission from ceasing to furnish electric service, and prohibited the city from removing its facilities from the streets unless authorized by the Commission, and that the city was without legal authority to prohibit the use or occupation of the streets in the city by the utility and was without power to maintain the suit. It is clear from the opinion (Rec. 301), that the court's decision rests on the holding that the city was without legal authority to prohibit the use or occupation of the streets by the utility and that it was without power to maintain the suit. The Supreme Court had jurisdiction in the case only by reason of the fact that the validity of the ouster ordinance was involved. (Ill. Rev. Stat. 1941, ch. 110, § 199.)

In the opinion the court stated the issue to be: "Can the plaintiff maintain this action?" Geneseo claimed this power by reason of a provision of its special charter that title to the streets was vested in it.

After a general discussion of the police power, and the power of the state to withdraw rights and functions granted to municipalities, the court held that whatever title had vested in the city had been withdrawn by the legislature from the municipality for utility purposes and placed in the Commission. The court stated that since the original

installation of the utility's facilities in the streets, the city had engaged in the sale of electric energy to the public as a competitor of the utility and by the exercise of a supposed governmental function seeks to oust that equipment from the streets, "the reason assigned being that the defendant's franchise, given it by the city, has expired."

The court then puts this question: "In that situation, is the defendant a trespasser by reason of maintaining its electrical equipment on such streets and has the plaintiff, by reason of its powers, reasonably and necessarily implied by the grant to it in its special charter, the right to eject the plaintiff's equipment from such streets?"

The city sought to invoke the doctrine of estoppel against the utility, claiming it was estopped under the provisions of its franchise contract from denying the right of the city to remove the utility's property from the streets. The court held that this franchise contract, in so far as it interfered with the Commission in the exercise of the powers granted it by the Utilities Act, was abrogated by that Act; that neither party to that contract could impinge upon the powers of the Commission. The court also held that to permit a city to exercise control over the instrumentalities of a public utility would be to give it concurrent jurisdiction with the Commission, a result not contemplated by the Public Utilities Act. The court specifically stated (Rec. 305) that it had expressly held in *Chicago Motor Coach Co.* v. *City of Chicago,* 337 Ill. 200:

> "that the provisions of the Utilities act withdrew from municipalities in this State the power which they had previously exercised in relation to the use of the streets, alleys and public places by public utilities and that these powers were conferred upon the commission."

Finally the court held: "The plaintiff was without legal power and authority to maintain the proceeding."

That the court decided the issue whether the city had the power to pass the ouster ordinance and maintain the suit is made clear by the judgment of remandment with directions to overrule the motion to strike the answer. The answer raised this issue among several issues. If the court was not resting its decision on this issue, it would not have ordered it reinstated in the answer. It is conclusively shown that the case was decided on the merits and not on the question of jurisdiction of the circuit court to entertain and decide the issue, because the order of remandment directed the circuit court to exercise further jurisdiction on the merits. *Investment Company* v. *New York Central R. R. Co.,* 271 U. S. 228, 231.

If a decision is rested on two or more different grounds, any one of which is sufficient to support it, whatever is said in the opinion relevant to any one of these grounds is not dictum but is the judgment of the court. *Railroad Companies* v. *Schutte,* 103 U. S. 118, 143; *Union Pacific Co.* v. *Mason City Company,* 199 U. S. 160, 166; *Richmond* v. *United States,* 275 U. S. 331, 340.

In *City of Paris* v. *Kentucky Utilities Co.,* 280 Ky. 492, 133 S. W. (2d) 559, the court, relying upon the principle announced in *McCullough* v. *Virginia,* 172 U. S. 102, held that a judgment rendered in a prior suit determining that a utility had the right to remain in the streets, was invulnerable to attack in an ouster suit, even though subsequent to the first judgment the statute was amended eliminating the basis on which the prior judgment was rendered.

The clear, unmistakable holding of the Supreme Court in the first Geneseo case was that the city had no power to eject the utility upon the expiration of its franchise

ordinance. This holding characterizes petitioners' circuit court judgments, entered on the authority of that case, so that those judgments confirm in petitioners the right to continue operations in the municipalities through the exercise of their certificates of public convenience and necessity, subject only to the control and regulation of the Commission.

The effect of the decision sought to be reviewed is to annul petitioners' circuit court judgments. A judgment cannot be examined except in a mode provided by law. *Garrison* v. *City of New York,* 21 Wall. 196.

If petitioners' judgments had been re-examined in a mode provided by law, opportunity would have been afforded petitioners to introduce in evidence the complaints and answers which framed the issues adjudicated by their former judgments. As it was the court reached its determination with respect to these judgments merely by reference to the opinion in the first Geneseo case.

The proposition that a court may in one proceeding annul a judgment that has been entered in a different proceeding is so clearly against the law of the land that it violates the requirements of the due process clause. While the Illinois Supreme Court took the position that it was not relitigating the issue decided in the first Geneseo case and therefore was not annulling petitioners' judgments, nevertheless it will appear to this Court upon an examination of the first Geneseo case in determining the Federal questions presented here that the Supreme Court in the decision of this case has nullified those judgments.

Conclusion.

IT IS, THEREFORE, RESPECTFULLY SUBMITTED that this case is one calling for the exercise by this Court of its super-

visory powers, by granting a writ of certiorari and thereafter reviewing and reversing said decision.

DAVID F. TABER,
of Chicago, Illinois,
Attorney for Illinois Northern Utilities Company, Petitioner.

CLAUDE A. ROTH,
of Chicago, Illinois,
Attorney for Central Illinois Electric and Gas Company, Petitioner.

ISHAM, LINCOLN & BEALE,
Chicago, Illinois,
WILSON & MCILVAINE,
Chicago, Illinois,
DIXON, DEVINE, BRACKEN & DIXON,
Dixon, Illinois,
HENRY WATERMAN,
Geneseo, Illinois,
GOTTLIEB & SCHWARTZ,
Chicago, Illinois,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

Nos. 1068 and 1069

ILLINOIS NORTHERN UTILITIES COMPANY,
Petitioner,
vs.
CITY OF GENESEO, ILLINOIS, and ILLINOIS COMMERCE COMMISSION,
Respondents.

CENTRAL ILLINOIS ELECTRIC AND GAS COMPANY,
Petitioner,
vs.
VILLAGE OF HEYWORTH, ILLINOIS, and ILLINOIS COMMERCE COMMISSION,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Illinois.

BRIEF OF RESPONDENTS, CITY OF GENESEO AND VILLAGE OF HEYWORTH, IN OPPOSITION.

JOSEPH L. SHAW,
Geneseo, Illinois,
RICHARD M. O'CONNELL,
Bloomington, Illinois,
CONRAD H. POPPENHUSEN,
ANAN RAYMOND,
THOMAS A. MATTHEWS,
A. L. STODDARD,
ROBERT Z. HICKMAN,
C. L. EMRICH,
Chicago, Illinois,
Attorneys for Respondents.
POPPENHUSEN, JOHNSTON, THOMPSON & RAYMOND,
Chicago, Illinois,
Of Counsel.

THE BUNTHORP-WARREN PRINTING COMPANY, 310 WEST JACKSON, CHICAGO

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IN THE

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OCTOBER TERM, 1941.

Nos. 1068 and 1069.

ILLINOIS NORTHERN UTILITIES COMPANY,
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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF OF RESPONDENTS, CITY OF GENESEO AND VILLAGE OF HEYWORTH, IN OPPOSITION.

The Decision Below.

The opinion of the Supreme Court of Illinois (R. 249) is reported at 376 Ill. 506 (Advance Opinions).

Questions Presented.

The questions presented by these cases, giving the largely hypothetical claims of petition and supporting brief the broadest possible intendment, are limited to the following:

1. Do petition and record properly present and have petitioners properly preserved any federal question of substance?

2. Assuming for argument's sake that any federal question is presented, did the Supreme Court of Illinois deny petitioners due process,

(a) By deciding judicially, on appeal from orders of an administrative body, that Illinois Commerce Commission has administrative jurisdiction and is charged with the administrative duty, under Illinois statutes and the undisputed facts in the record, to issue the orders prayed in the complaints before it,—petitioners in the same proceedings vigorously having invoked and asserted the jurisdiction of the Commission to deny such relief?

(b) By refusing, in arriving at that decision, to apply the principle of *res judicata* to certain of its own alleged prior decisions and certain alleged prior adjudications of its circuit courts?

Statement of the Case.

Petitioners have not stated the case, in either petition or brief, in such a way as to present the matter involved, and what is material to consideration of questions presented, as required by Rules 38 and 27.

Each of these cases involved the right and power, under the Illinois statutes, of an Illinois municipality to control and license the entry upon and occupation of streets, alleys and public places, and the space in, on and above

them, by an electric public utility, and to terminate such occupation and performance of utility service within the municipality, the franchise or license granted by the municipality having expired, and adequate utility service other than that furnished by the enfranchise or licensee, still operating and occupying the streets after the expiration of its franchise or license, being available.

Respondent, City of Geneseo, was organized by special legislative act approved February 16, 1865, (I, Ill. Pvt. Laws, 1865, p. 370). In 1870, Illinois adopted a constitution, section 22 of article IV of which prohibited the enactment of laws relating to municipalities except by statutes of general application. April 10, 1872, the legislature enacted a general municipal enabling act, ever since known as the Cities and Villages Act of Illinois (Laws of Ill. 1871-72, p. 218). Under that act, respondent Village of Heyworth was organized. Section 1 of article V of the original act contained no less than 96 clauses specially enumerating powers expressly granted to cities and villages formed or reincorporated under the act. This section the General Assembly repeatedly supplemented and reenacted; and also passed innumerable independent acts; all adding to and reinforcing, and none curtailing, municipal powers. August 15, 1941, by an act effective January 1, 1942, the Cities and Villages Act and nearly 200 such related statutes all were codified into and now constitute the Revised Cities and Villages Act (Ill. R. S. 1941, ch. 24, arts. 1-87). Article 1, section 5 of this statute applies the act generally to all special charter municipalities, except in case of specific conflict. This recital is declaratory of the law as construed for many years prior to the codification.

In 1913 Illinois first enacted a public utilities act (Ill. R. S. 1913, ch. 111a). This statute followed the usual plan of such statutes. It imposed upon public utilities certain duties, liabilities and prohibitions; it created a commission with administrative and quasi-judicial powers; it imposed

upon the commission the duty of supervising the public utilities and *requiring their compliance* with the statute, with *all other laws*, and with their franchise obligations; and it granted the commission administrative powers necessary for such purposes. In 1921 the statute was repealed and reenacted without substantial change (Ill. R. S. 1941, secs. 1-95, ch. 111⅔), except to create the present Illinois Commerce Commission.

As originally enacted in 1872, and by innumerable amendments since, the Cities and Villages Act granted, and still vests in municipalities, express powers which over and over again have been held by the Supreme Court of Illinois to be or to include the power to grant or refuse licenses or franchises for the occupation of streets by public utilities, to limit the duration of such licenses or franchises, to fix the terms and conditions thereof, to refuse to renew them, and to enforce the termination thereof. This was true before the Public Utilities Act of 1913; under it; and ever since its reenactment by the Public Utilities Act of 1921 (R. 202-3, 257-8). Geneseo's special charter, whether or not aided by the construction of the Cities and Villages Act now embodied in the present article 1, section 5 thereof, conferred upon that respondent powers equally broad and express. Prior to the "first Geneseo case" in 1936, there was no holding that municipal power to order off the streets utilities whose franchises had expired had been either abrogated or transferred to the Commission. The decisions of the Supreme Court of Illinois relied on as having so suggested, did not justify the construction claimed for them by petitioners and others similarly interested (R. 253-54, 256-57).

In each of the present cases the utility facilities of the petitioner first were placed in, upon, over, through the space over, and in the space above the streets, alleys and other public places of the municipality, under a license or

franchise of expressly limited duration, granted by the local municipal legislative body. In each case the license or franchise had expired by lapse of its stipulated period of duration; the respondent municipality had notified the petitioner of intention not to renew; had constructed and was operating, under powers expressly granted by statute, an adequate plant and system of its own; and had ordered petitioner to cease occupying the streets for the purpose of rendering public utility service to the inhabitants, and remove its facilities therefrom. One petitioner had a certificate of convenience and necessity issued by the Commission in 1931, covering its utility operations in respondent municipality, and the other claimed that under section 55[1] of the Public Utilities Act it was entitled to such certificate (R. 52, 138). Each petitioner, at the expiration of its local license and when ordered to remove, was still rendering public utility service to a minority of the inhabitants of the municipality, and also to a much smaller part of the inhabitants of adjacent rural territories. Each petitioner refused to remove its facilities, terminate occupation, or discontinue service within the municipality.

Each municipality then filed its complaint in the local circuit court, asking a mandatory injunction—a remedy which, theretofore, had been clearly available under numerous decisions of the Supreme Court of Illinois. *Central Illinois Public Service Co.* v. *Swartz*, 284 Ill. 108, 114; *City of Sullivan* v. *Central Illinois Public Service Co.*, 287 Ill. 19, 215 Ill. App. 606, 294 Ill. 101, 221 Ill. App. 561. In the suit brought by City of Geneseo the defendant (petitioner Northern) answered, alleging as defenses the propositions stated at page 251 of the Record here. Since both petitioners now urge that decisions based on this "first Geneseo case" are *res judicata* in the present cases, it is worth noting that in such answer Northern asserted that the suit was premature, the circuit court had no jurisdic-

1. Ill. Rev. St. 1941, ch. 111⅔, § 56.

tion, and the municipality must first apply to the commission, its specific allegation in that respect being:

> "That because of the lack of a determination by said Illinois Commerce Commission that defendant should cease furnishing electric service to the public in the plaintiff city, and in said unincorporated territory contiguous to the plaintiff city, this present suit is premature, and this honorable court is without jurisdiction to exercise an administrative function which the General Assembly of the State of Illinois by the enactment of said act concerning public utilities has vested in said Illinois Commerce Commission."

The circuit court sustained a motion to strike the answer. It was in that situation that the Supreme Court of Illinois heard Northern's appeal. As pointed out elsewhere (R. 213-14) the sole question was, Can the plaintiff maintain this action? The court held (R. 306) that whether defendant utility should discontinue service in the municipality must be determined by the Commission. In the opinion the court discussed points raised in support of the injunction, and summarized at R. 214. The decision did not incorporate the opinion, but was solely that the decree below was reversed and the cause remanded with directions to overrule the motion to strike the answer (R. 307; *City of Geneseo* v. *Illinois Northern Utilities Co.*, 363 Ill. 89, 93). Pursuant to this mandate the trial court, on bill and answer, dismissed the suit (R. 31). On the authority of the decision the proper circuit court also dismissed a similar complaint of Village of Heyworth against the other petitioner herein (R. 114-121).

The circuit courts entered these decisions in June and November, 1936 (R. 31, 119). Thereupon, in November, 1937 (R. 1, 71) each municipality filed with the Commission its separate complaint (in accordance with section 64[1] of the Public Utilities Act) against each petitioner here, seeking an order from the Commission requiring petitioner to

1. Ill. Rev. St. 1941, ch. 111⅔, § 68.

remove its facilities from and discontinue furnishing electric service within complainant municipality.

Each defendant filed a detailed answer in which, after extensive matters of inducement, and after categorical admission of the Commission's power to compel it to vacate on expiration of its local franchise (R. 4, 8, 75, 78), it set up and relied upon two defenses: (1) that the discontinuance of its utility service in and the removal of its utility facilities from the plaintiff municipality would not be in furtherance of or compatible with the public convenience and necessity, and (2) that by reason of its certificate of convenience and necessity, or right thereto, it had under the Public Utilities Act a franchise or license not terminable so long as it should be able and willing to and should furnish adequate service at fair rates, *i. e.*, that it had a vested franchise right to remain (¶¶ 15 and 16, R. 11, 12; ¶ 14 and amendment, ¶ 2, R. 79, 86). The petitioners here, in other words, invited a construction of the statutes and claimed that neither of them had violated any provision thereof.

Neither defendant anywhere in its answer, or in any other pleading, ever has alleged that its right to continue rendering utility service and maintaining its facilities was adjudicated in its favor, either by the first Geneseo case or by the decisions of the circuit courts, rendered in the one case pursuant to the mandate therein, and in the other, on the authority thereof (R. 295-6).

On the issues thus joined extensive evidence was heard by the Commission (R. 12-37, 89-127). There was, and there is, no dispute over any essential fact. There was, and there is, no indication in the record anywhere of a penny of expenditure or other legal detriment by either petitioner, in reliance on the first Geneseo case or the circuit court decisions.

The causes thus having been submitted, and thereafter

extensively briefed and argued (R. 42, 128), with the fundamental issues of the respondents' right and power to terminate utility occupation and services on expiration of local franchises, and of the Commission's obligation on complaint of the municipalities to order such termination, fully discussed throughout, the Commission, on April 26, 1939, entered separate orders denying the prayer of and dismissing each complaint. In each case, after an abridged statement of the pleadings and evidence, the Commission set out in detail its own construction of the opinion in the first Geneseo case, and the effect of the Public Utilities Act on municipal powers to license, control and terminate utility occupation of streets; and arrived at extended legal conclusions (R. 42-51, 128-37), in which its power and authority to apply the law to the undisputed facts, as well as its jurisdiction to entertain and hear the complaints, and its views of the legal merits, were developed at length.

Thereupon the Commission in each case entered findings and order (R. 51-53, 137-39) denying the prayer that the defendant be required to remove its facilities and cease utility service within the municipality, and dismissing each complaint.

Sections 67, 68 and 69 of the Illinois Public Utilities Act (Ill. R. S., 1941, ch. 111⅔, §§ 71, 72 and 73) provide in part:

> "67. * * * Within thirty days after the service of any rule or regulation, order or decision of the Commission, any party to the action or proceeding may apply for a rehearing in respect of any matter determined in said action or proceeding and specified in the application for rehearing. * * * *no person or corporation* in any appeal *shall urge or rely upon any grounds not set forth in such application for rehearing* before the Commission[1] * * *.
>
> "68. * * * any person or corporation affected by such rule, regulation, order, or decision may appeal to the circuit court * * * for the purpose of *having*

1. Italics supplied.

the reasonableness or lawfulness of the rule, regulation, order or decision inquired into and determined. * * * said appeal * * * shall be tried * * * according to the rules relating to chancery suits, so far as same are applicable.[1]

"69. Appeals * * * to the Supreme Court * * * shall be governed by the rules applying to other civil cases appealed to said Supreme Court, except that formal pleadings shall not be required."

Pursuant to Section 67, respondents here each duly applied for a rehearing before the Commission, challenging in detail, *inter alia,* the Commission's construction of the statutes, its construction of the first Geneseo case, its power to give effect to its orders thus creating the licenses or franchises claimed by the respective public utilities, and its failure to discharge its duty to order the public utilities to cease occupation of the streets under the specific mandate of the statutes (R. 54-58, 139-144).

Rehearings having been denied (R. 58, 144), each municipality appealed to the proper circuit court pursuant to Section 68. There, after hearing and argument upon the records as certified by the Commission, decrees were entered affirming the Commission's orders (R. 62, 146). The opinions of both courts (R. 66, 146) indicate clearly enough that they accepted the present petitioners' arguments that the conclusions of the Commission, legal as well as factual, were not only correct, but unescapable in view of the opinion in the first Geneseo case.

Thereupon, pursuant to Section 69, each municipality appealed the affirming order of the circuit court to the Supreme Court of Illinois, and the causes were consolidated.

Each defendant before the Commission, both circuit courts, and the Supreme Court of Illinois, vigorously asserted and invoked the jurisdiction of the Commission to make the above findings and conclusions and enter the

1. Italics supplied.

above orders, and vigorously defended the findings, conclusions and orders when made. Only when the Supreme Court of Illinois in its first opinion (R. 157) held that the decisions of the circuit courts must be reversed and the Commission's orders set aside did petitioners suggest that if the Commission had decided against rather than for them it might so have exceeded its jurisdiction as to have deprived them of property without due process (R. 165-66, 186-87). At the last stages of the proceedings on rehearing, petitioners here still asserted that the orders of the Commission should be affirmed (R. 248).

In arriving at the judgment reversing the circuit courts, review of which is sought here (R. 298-9), the Supreme Court of Illinois dealt briefly but fully with the Commission's jurisdiction (R. 267) treating it entirely as a matter of construction of local statutes. It analyzed and construed its own opinion in the first Geneseo case (R. 250-53, 255) in terms which bear no resemblance to the partisan and by no means accurate summary at pages 3-5, 7, 24-27 of the petition and brief here. Neither in this nor in its first opinion did it state, as implied on page 7 of the petition and brief, that it overruled the decision in the first Geneseo case. What it did do was to overrule any statements in the opinion in the former case, inconsistent with the views expressed in the later opinions (R. 160, 266).

Summary of Argument.

I. No federal question of substance is presented in or saved by petition or record. The validity and construction of orders of state administrative bodies, and the extent to which prior decisions of state courts are to be *res judicata* in subsequent litigation, are matters of local law, on which the decisions of the highest state court are controlling. The two alleged questions of due process now raised—consideration by the reviewing court of an issue claimed to have

been beyond the jurisdiction of the administrative tribunal whose order was being reviewed, and failure to apply the doctrine of *res judicata* to prior decisions—insofar as presented at all, first were presented on petition for rehearing. If they had any federal aspect, it was inherent in the original invocation of the Commission's jurisdiction and arose not from the decision of the Supreme Court of Illinois but at the very beginning. Such federal aspect neither was passed upon by the Supreme Court of Illinois, nor was it necessary to that court's decision.

II. Assuming, for the sake of argument only, that any federal question is presented, the Supreme Court of Illinois did not decide it adversely to previous decisions of this Court, or deny due process in the course of its decision.

A. The Supreme Court of Illinois did not exceed its appellate jurisdiction unless in remanding the cases to the circuit courts it told those courts to direct the Commission to do something which the Commission does not itself have jurisdiction to do. Under Sections 8, 9, 60, 64, 65, 75 and 79[1] of the Public Utilities Act of Illinois the Commission clearly has power and authority to entertain and hear complaints such as those of the respondents herein; and, depending on the merits, to enter the findings, decisions and orders which the Supreme Court of Illinois found erroneous in these cases or the findings, decisions and orders which the opinion of that court now directs it to enter. The Commission proceeded on complaints, due notice, answers in which petitioners did not deny but asserted and invoked the Commission's jurisdiction, full hearing, and ample provision for review and appeal. In reviewing its legal conclusions on appeal, the courts exercised purely judicial functions.

No one under such circumstances is deprived of due process merely because a determination in his favor has been reversed.

1. Ill. Rev. St. 1941, ch. 111⅔, §§ 8, 9, 64, 68, 69, 79, 83, respectively.

B. The refusal of the Supreme Court of Illinois to enforce or be bound by the earlier decisions of the circuit courts constitutes no violation of due process. Petitioners pleaded, not that their right to continue in respondent municipalities had been determined by the prior decisions and therefore was *res judicata,* but that under section 55 of the Public Utilities Act they in effect had franchises from the state, removing the necessity of local franchises and making the latter unenforceable. The Supreme Court of Illinois, as a purely local matter, adopted a different construction, both of the first Geneseo case and of the Public Utilities Act, overruling and disapproving petitioners' contentions in that behalf.

No one is deprived of due process when a state court of last resort construes its own prior decisions or its local statutes, changes such construction, or corrects its own past errors.

ARGUMENT.

I.

No Substantial Federal Question Is Set Out as the Basis of Jurisdiction. No Such Question Is Presented in or Saved by the Record.

Petitioners rest their entire case, both as to merits and as to the presence of a federal question, on two propositions:

1st. That these cases are statutory appeals from decisions of a non-judicial commission; that neither commission, nor the court on appeal had jurisdiction to do anything beside determine whether or not public convenience and necessity demanded the ouster of the petitioners; that for the court to review or discuss the decision in the first Geneseo case, and the statutes bearing on the question, was in excess of its jurisdiction, and that, therefore, when the Supreme Court of Illinois held that the Public Utilities Act had not repealed the powers granted to cities by the Cities and Villages Act, it was deciding a question that was not, and could not be, in the case, was going beyond its jurisdiction, and so was depriving petitioners of their rights without due process.

2nd. That by virtue of the decisions of the circuit courts when they obeyed the mandate of the Supreme Court of Illinois in the first Geneseo case, and dismissed the bills for mandatory injunctions, petitioners acquired vested rights to continue to occupy the streets of Geneseo and Heyworth respectively; that the decision of which review now is sought, by ignoring the rules of *res judicata*, failed to recognize these rights of petitioners, and therefore deprived petitioners of such rights without due

process of law. In order to escape the rule that *res judicata* is an affirmative defense which must be pleaded to be availed of (a rule which petitioners failed to observe) they rely on the first proposition, *i. e.*, that the only issue the commission could consider was that of public convenience and necessity; that the court, on appeal, was confined to that issue, and that, therefore, petitioners had no opportunity to present to the court their defense of *res judicata.*

Petitioners state these two propositions, in substance, on page 1 of the petition, repeat them again and again in the course of the petition and brief, and must stand or fall with their soundness or error.

The first proposition presupposes that the Illinois Commerce Commission, as an administrative agency, by disregard of the law and the issues before it, could have deprived the Supreme Court of Illinois of jurisdiction to decide a judicial question squarely presented by the record, in the face of the fact that the Court, having inherent power so to do, determined both the Commission's and its own jurisdiction and construed the statutes directly contrary to petitioners' contentions. The second assumes that the petitioners each had a vested right, not in the actual decision in the first Geneseo case or the circuit court judgments based thereon, but, rather, in a construction of that decision, which though adopted by the Commission and vigorously defended by petitioners, turned out to be contrary to the one reached by the Supreme Court of Illinois itself, after an exceptionally full and able analysis of the whole prior law on the subject.

As heretofore noted (*supra,* p. 7) in the proceedings before the Commission, each petitioner set up two defenses, the first being that public necessity and convenience did not demand its ouster (R. 11, 79); and the second, that it had a vested right to remain indefinitely (R. 12, 86).

Both petitioners, therefore, claimed before the Commission, not only that their ouster would not promote public convenience, but that they had a vested right to remain undisturbed "under the facts and circumstances here complained of" (R. 12) which was, in effect, the claim of a right to remain, regardless of necessity and convenience.

The Commission, by basing its decision on the question of public convenience, necessarily held adversely to the petitioners on their claim of vested rights.

The Supreme Court of Illinois on appeal was confronted with the same question. Not only did the Supreme Court have jurisdiction to pass on the questions decided by the Commission. It had to do so in order to dispose of the issues raised by the petitioners' answers. Before it could pass on the question of public convenience, it had to decide whether or not the petitioners could be ousted. Having, on this defense, decided adversely to the petitioners, it then disposed of the question of public convenience, as follows:

> "In a case such as the present one, where the city has a utility in full operation, capable of furnishing the public with the service heretofore required of the Company, the question of continuing in the street is not one that may be authorized by the Commerce Commission, but, * * * etc." (R. 264).

In other words, wherever a municipality has an adequate plant, public convenience does not demand the retention of the services of the utility, and it may be ousted. The Supreme Court adopted a different standard from that set up by the Commission. The latter body had held that unless public convenience *demanded the ouster* of a utility, upon the expiration of its franchise, it *could not* be ousted. The Court held that unless public convenience *demanded the retention* of the utility, it *must* be ousted when its local franchise expired.

As to the present claim that the state court ignored the

rules of *res judicata,* the real complaint of petitioners should be that the state court *did* observe those rules. Inasmuch as petitioners did not plead their defense of *res judicata,* assuming they had such a defense, they can blame no one but themselves, if the court paid no attention to it. If the pleader sets up the same defense that was set up in a prior suit, without pleading it as *res judicata,* the defense is again opened up for decision on its merits. If, therefore, petitioners are right in contending that the Supreme Court of Illinois reconsidered the first Geneseo case, and overruled it, they invited the court to do so by again presenting to it the same defense they had previously relied on, but without claiming the benefit of a former adjudication.

The court grounded its decision wholly upon its own construction of the Cities and Villages Act and related statutes and the special charter of Geneseo on the one hand, and the Public Utilities Act and amendments thereto on the other. Neither the power of the court to determine its own jurisdiction on appeals from the Commission (Petition, p. 13) nor the power of the highest state court to determine the jurisdiction of a creature of the state, such as the Commission, can possibly be called, even remotely, a federal question. Petitioners admit by their petition that they claimed a federal right but did not argue it. The very essence (a) of respondents' original petitions, (b) of respondents' petitions for rehearing before the Commission which crystalized the issues of these cases (R. 54, 139; *supra,* p. 9) and (c) of the contentions of the respondents throughout their briefs and arguments before the Commission and before each court in succession, was that neither of the petitioners had any such right as it was claiming to possess. The complaint of the petitioners here melts down to a claim that the refusal of the state to give them a right which they never possessed is a federal question and that this Court may be asked to grant

them such right as a federal sanction upon the State of Illinois.

The decisions of the highest state court upon the validity and construction of orders of state administrative boards and commissions are final here. They are matters of local law. *Hotel & R. E. Internat'l Alliance* v. *Wisconsin Employment Relations Bd.* (Mar. 2, 1942) ..... U. S. ....., 62 Sup. Ct. (adv.) 706, 708; *Ex Parte State of Texas* (Jan. 12, 1942), ... U. S. ....., 62 Sup. Ct. (adv.) 418, 421; *Great Northern R. Co.* v. *Sunburst Oil & Refining Co.*, 287 U. S. 358, 362, 365; *Alton R. Co.* v. *Illinois Commerce Comm.*, 305 U. S. 548, 554; *J. Bacon & Sons* v. *Martin*, 305 U. S. 380, 381. The Illinois court decided that it had jurisdiction in the appeals from the Commission's order to consider whether the orders were lawful, decide what the law required the Commission to do upon the particular complaints, and hold the Commission's orders invalid. All these questions are thus conclusively disposed of by the decision of which petitioners complain. Since the decision decides that the petitioners never had the vested right they sought to establish, and since they could have had that right, if at all, only by virtue of a state statute which the state court has construed against their claim, no federal quesion upon the point ever could be said to exist.

Similarly the state court has held that its former decision was not *res judicata* of any issue in the present case. The present decision is controlling on the question. *Oklahoma Packing Co.* v. *Oklahoma G. & E. Co.*, 309 U. S. 4, 8; *Great Northern R. Co.* v. *Sunburst Oil & Ref. Co.*, 287 U. S. 358, 362-365. This Court will accord to any decision of the highest state court only the effect given to it by that court. *Wright* v. *Georgia R. & Bkg. Co.*, 216 U. S. 420, 429. This Court then will hold with the state court that there is no basis for a claim of *res judicata* or other bar or estoppel in favor of petitioners, and consequently, also,

that no federal question exists here. *Tidal Oil Co.* v. *Flanagan*, 263 U. S. 444, 451-452.

At the earliest prospect of state action, any prospective conflict with the Fourteenth Amendment must be brought to the attention of state authorities. This can be done before administrative as readily as before judicial tribunals. *Natural Gas Co.* v. *Slattery*, 302 U. S. 300, 309-11. But until the first opinion of the Supreme Court of Illinois the petitioners vigorously asserted and invoked the jurisdiction of the Commission to say "no" where they now assert that it is unconstitutional to say "yes". They also pleaded that they had a right to remain in respondent municipalities, which was a vested one in and of itself, not by reason of any prior adjudications. In the original answer the only reference to the federal constitution was the assertion that to oust petitioners in view of their rights under section 55 of the Public Utilities Act and the other existing circumstances would be to deprive them of property, *i. e.*, this vested right, without due process (R. 12, 86). This plea never was mentioned again by the petitioners, the Commission, either of the circuit courts, or the Supreme Court of Illinois.

No other constitutional objection was mentioned until the petition for rehearing which followed the first opinion of April 10, 1941. There for the first time petitioners asserted that there had been a "substitution of issues" (R. 165-66), and a failure of the Supreme Court of Illinois to apply the doctrine of *res judicata* (R. 174), which deprived petitioners of their property without due process in violation of section 2 of article II of the Constitution of Illinois and of the Fourteenth Amendment to the Constitution of the United States. Both these suggestions were analyzed in respondents' answer to the petition for rehearing (R. 181-87, and particularly 185-87, 207-220).

These two propositions were restated—the first, how-

ever, in different terms—in the reply to the answer to petition for rehearing (R. 228, 240-6). There petitioners asserted that the Commission's hearing a "judicial question" was a violation of both state and federal constitutions; and that failure to apply the doctrine of *res judicata* "would result in a deprivation of appellees' constitutional rights," without specifying whether state or federal rights were intended.

In its final opinion the Supreme Court of Illinois did not even mention any question under either state or federal constitution, although it dealt categorically with the first Geneseo case (R. 253-257), and with the question of the Commission's jurisdiction under the Public Utilities Act of Illinois (R. 262-5, 267), reaching conclusions as to both, as a matter of Illinois law only, directly contrary to those for which petitioners had argued.

While claims of some deprivation of constitutional right again were made when petitioners moved for reconsideration of the second and final opinion (R. 286, 287) the petitioners' main objective was to persuade the court to affirm the decision below on the basis of *res judicata* and *stare decisis* (R. 288) and all other matters, including the supposed questions on which the present applications rest, were incidental. The court in denying the motion and in releasing the order of remand (R. 297-9) did not find it necessary to advert to these claims of constitutional deprivation.

In this state of the record, no federal question is either presented or saved for this Court's consideration. On the rehearing petitioners clearly were not in a position to claim surprise or assert that they had had no reason to anticipate the court's reversal of the judgments below (R. 187). Even if the constitutional question had been fully presented by the pleadings, it was neither passed upon by, nor essential to the decision of, the state court of last resort.

The state court's interpretation of Illinois statutes is not open to review here. *Quong Ham Wah* v. *Industrial Accident Commission of California*, 255 U. S. 445, 448; *Roe* v. *Kansas*, 278 U. S. 191, 193; *Zucht* v. *King*, 260 U. S. 174, 176. Even if the court had passed specifically upon the constitutional questions, either state or federal, which petitioners by their petition for rehearing in the state court attempted to raise, its holding, if not dictum pure and simple, would have been at most an alternative or separate ground for its decision, completely distinct from that portion of the opinion which held against petitioners after construing the statutes to mean that petitioners did not have the rights which they had asserted below and which the inferior state tribunals had upheld.

The cases, in other words, have been decided by the state court on adequate non-federal grounds. The principle of *Lynch* v. *N. Y. ex rel. Pierson*, 293 U. S. 52, 54, and *Southwestern Bell Telephone Co.* v. *Oklahoma*, 303 U. S. 206, 212, controls. As said in *Lynch* v. *N. Y. ex rel. Pierson*, 293 U. S. 52, 55, this Court will not grant certiorari to review a decision of a state court of last resort unless a federal question was necessarily decided, and if the non-federal grounds were sufficient to sustain the decision there is no federal jurisdiction. As in *McGoldrick* v. *Gulf Oil Corp.*, 309 U. S. 2, 3, this Court on this record will be unable to find, as justification for intervention with a writ of certiorari, that the decision of the highest court of the state did not rest on an adequate non-federal ground. To the same general effect, *Honeyman* v. *Hanan*, 300 U. S. 14, 18-23, and *N. Y. C.* v. *Central Savings Bank*, 306 U. S. 661. See also, *Fox Film Corp.* v. *Mueller*, 296 U. S. 207, 210; *Utley* v. *St. Petersburg*, 292 U. S. 106, 111, 112. In such state of the record even the fact, non-existent here, that the federal question relied on was presented by the pleadings will not aid if such question was not passed on by the state supreme court. *White*

River Co. v. *Arkansas*, 279 U. S. 692, 700; *Cochran* v. *Chicago*, 311 U. S. 610, dismissing appeal from 296 Ill. App. 645, 373 Ill. 567.

Only as to the so-called jurisdictional question do petitioners claim that their first opportunity occurred on rehearing (petition and brief, p. 13). That assertion is incorrect (R. 187). Even if the state court had considered any federal question whatever, such question was not called to its attention by adequate specifications, nor necessarily involved in the determination of the cause. Both requirements are imposed by such decisions as *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 248. Under such circumstances, the case is not within the jurisdiction of this Court as limited by section 237 of the Judicial Code, and petitioners' passing references to federal questions, not considered or necessary in reaching the state court's decision, are without consequence here. *N. Y. C. R. R.* v. *N. Y.*, 186 U. S. 269, 272; *Live Oak Ass'n.* v. *R. R. Comm.*, 269 U. S. 354, 357, 359; *Capital City Dairy Co.* v. *Ohio*, 183 U. S. 238, 248.

Nor is any question of public policy involved in these cases. There is nothing whatever in or outside of this record to justify the attempted implication that these petitioners, or anyone else in like situation, ever have sustained any legal detriment whatever in reliance on the first Geneseo case or the 1936 circuit court decisions. Still less justification exists for the attempt (R. 175-76, 216-20, 223, 268, 282, 296) to drag before the court parties who thus far have shown no signs of sharing petitioners' concern over the results of a correct interpretation of the statutes of Illinois by the court of last resort of that state.

II.

Assuming for Argument's Sake That the Record Presents Any Federal Question, the Supreme Court of Illinois Did Not Decide It Adversely to Previous Decisions of This Court, or Deny Due Process in the Course of Its Decision.

The question decided by the Supreme Court of Illinois was, in substance, this:

> "When a city has established its own utility, which is adequate to supply the needs of the public, the utility company which previously has been serving that city, upon the expiration of its franchise, may be required to vacate the streets of the city."

This Court has decided that question adversely to the contentions of petitioners in such cases as *Detroit United Ry. Co.* v. *Detroit*, 229 U. S. 39, 46, and *Detroit United Railway Co.* v. *Detroit*, 248 U. S. 429, 436.

Not the result, but something done in the course of reaching it, therefore, must have deprived petitioners of due process if anything did.

A. The decision of the Supreme Court of Illinois that on reversal and remand taking effect the Illinois Commerce Commission will have jurisdiction to enter the orders prayed in the original complaints before it, constitutes no violation of due process.

Contrary to petitioners' statement as to the jurisdiction of the Commission (petition, p. 10) the state court of last resort has decided that the statute imposed on the Commission a duty on complaint of the municipalities, and under the facts found by the Commission and disclosed by the record, to require the petitioners to cease occupation of the streets. Such construction of a state statute by the highest court of a state is controlling. The petition

points out no violation of the Fourteenth Amendment by reason of which this Court should disturb it, or interfere with its application to these petitioners. Such construction and application were in issue from the beginning (R. 187) and petitioners could have avoided observing it only by complete somnambulance.

Assuming that the Supreme Court of Illinois could not have decided anything on review that was not within the original jurisdiction of the Commission to decide, it is difficult to see what was before the Commission if it was not just what the Supreme Court of Illinois decided. The facts were undisputed and of the sort not susceptible of serious dispute. The Commission's sole duty was to apply the law properly to those facts. What it should direct the utilities to do in view thereof was the whole issue before it. The Supreme Court of Illinois many times has held that under such circumstances it is its own duty to make sure that the Commission has applied the law properly to the facts. R. 185, and such additional cases as *Illinois Commerce Commission* v. *Chicago Railways Co.*, 362 Ill. 559, 565; *South Chicago Coal & Dock Co.* v. *Illinois Commerce Commission*, 365 Ill. 218, 225.

Both sides came before the Commission proclaiming that the question involved was the ouster of the utility under the admitted facts in each case. The cases before the Commission, the circuit courts and the Supreme Court of Illinois were tried and argued on the theory that the primary question was the right of the utilities to remain after their local franchises had expired. Sections 8, 9, 60, 64, 65, 75, and 79[1] of the Public Utilities Act of Illinois clearly confer on the Commission power to inquire into such matters. Typical is section 8, imposing the duty of inquiring whether utilities are complying with the provisions of the act and any other law, with the orders of the Commission, and with charter and franchise requirements.

1. Ill. Rev. St. 1941, ch. 111⅔, §§ 8, 9, 64, 68, 69, 79, 83, respectively.

Contrary to the assertion now made, petition and brief, p. 13, that the issue whether the petitioners should or should not be ousted was not made by the records before the Commission, the prayer of each of the complaints was, specifically, that petitioners should be ousted (R. 4-5, 75); and the answer in each case was devoted to a showing of the reasons why they should not be. If, rather than answering, petitioners had defaulted, and the orders prayed in the complaints had issued *pro confesso*, could petitioners now argue that such orders were void for want of jurisdiction, or that enforcing them would conflict with the Fourteenth Amendment?

Whether the jurisdiction of the Commission is an exclusive one as implied in the first Geneseo case (R. 306), or one concurrent with that of the circuit court, as suggested in the first opinion herein (R. 160), can make no possible difference as far as any question of due process is concerned. If the Commission had power to entertain and hear the petitions and answers (as petitioners repeatedly have asserted that it had), it must have had full authority to apply the proper rule of law to uncontroverted facts, and committed legal error for which the right of review was the remedy, when it failed to do so. To limit this authority to "convenience and necessity" only would be to cut off entirely the respondents' right to have a hearing anywhere on the question whether the utilities should go as required by their local franchises, or stay by virtue of the rights asserted under the utilities act, and especially § 55 thereof. That this is the petitioners' objective is sufficiently indicated by the fact that, notwithstanding the Commission's asserted want of power to deal with the petitioners' rights under the local franchises as compared with those under the certificate of convenience and necessity, which one of them had and the other asserted that it was entitled to, they still are insisting of record that the orders of the circuit courts, confirming the extended findings, conclusions and orders of the

Commission on that very subject matter, ought to be affirmed (Reply to answer to petitions for rehearing, R. 248).

The complaints and answers before the Commission put in issue every vestige of right the petitioners possessed with respect to occupation of the municipal streets, the jurisdiction, powers, and duties of the Commission, and the construction of the applicable statutes. The Commission's order acknowledged that the complaint was made to compel the public utility to terminate occupation of the streets (Finding (7), R. 52-53, 138) but construed the law as meaning that there was no provision in the Public Utilities Act empowering the Commission to act pursuant to the prayer of the complaint (Finding (8), R. 53, 138). The respondents' petitions for rehearing (R. 54, 139) preserved all issues of law for appeal.

In this situation, the Supreme Court of Illinois upon appeal construed the statutes and the powers and duties of the Commission under the law in a manner highly derogatory, both to the petitioners' contentions and to the Commission's own views. In doing so, the court exercised only judicial functions. *Rochester Telephone Corp.* v. *U. S.*, 307 U. S. 125, 131; *Federal Radio Com.* v. *Nelson Bros. B. & M. Co.*, 289 U. S. 266, 276, 277, 278; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 345. Review of an administrative determination requires consideration of every question of law (*Anniston Mfg. Co.* v. *Davis, supra*) and determination whether the proper rule of law has been correctly applied (*Hormel* v. *Helvering*, 312 U. S. 552, 555, 556, 557). The petitioners have confused the Commission's jurisdiction based upon the statute, to entertain and hear, with the entirely different matter of what the Commission did on having entertained and heard. In its every act, the Commission must venture a construction of the statute from which its authority is de-

rived. *Powell* v. *United States,* 300 U. S. 276, 287; *Hormel* v. *Helvering,* 312 U. S. 552, 556. Such approach to the judicial question is not conclusive on the appropriate court, acting judicially. *American School of M. H.* v. *McAnnulty,* 187 U. S. 94, 110, 111; *Johnson* v. *Towsley,* 13 Wall. 72, 82-86; *The Chicago Junction Case,* 264 U. S. 258, 264, 265; *Hormel* v. *Helvering, supra.* The doctrine of administrative finality which petitioners advance is applicable only to questions of primary, evidentiary, and circumstantial facts, never to questions of law. *Helvering* v. *Tex-Penn Oil Co.,* 300 U. S. 481, 491; *Federal Communications Com.* v. *Pottsville Broadcasting Co.,* 309 U. S. 134, 145; *Powell* v. *United States, supra; Anniston Mfg. Co.* v. *Davis, supra.* The power of an administrative board will not be deemed to include refusal to perform an act which the statute, as construed by the state court of last resort, enjoins upon it under the facts and circumstances as found or admitted by such board. *Dismuke* v. *United States,* 297 U. S. 167, 172, 173; *United States ex rel. Louisville C. Co.* v. *Interstate Com. Com.,* 246 U. S. 638, 643.

If, as in such cases as *Coe* v. *Armour Fertilizer Works,* 237 U. S. 413, 426, a party is in court for a limited but not a general purpose, it may be a denial of due process to give general relief against him. But no more before an administrative tribunal than before a court may he concede, assert and invoke jurisdiction if the result be favorable, but claim the benefit of the Fourteenth Amendment if it be adverse. On appeal he may not, vigorously and throughout several hundreds of pages of record and briefs and extended oral argument, contend that a favorable administrative result should be affirmed, and then, when the reviewing court reverses, assert that it has deprived him of due process.

The requisites of due process are satisfied when a tribunal (either judicial or administrative) having jurisdiction proceeds, in accordance with due notice and opportunity to

be heard, to decide a matter within the scope of its common law or statutory jurisdiction on the one hand, and of the controversy before it on the other. The cases cited by petitioners, notably on pp. 15-16, 23-24, of its petition and brief, are not to the contrary, as the footnotes to this Court's opinion in *Brinkerhoff* v. *Hill,* 281 U. S. 673, 680-81, plainly indicate. Some of the earlier decisions of this Court to this effect are collected in *Asbury Truck Co.* v. *R. R. Com.,* 52 Fed. (2d) 263, 268-69, and in the affirmance, 287 U. S. 570. The same general principles have been applied in such more recent cases as *West Ohio Gas Co.* v. *Public Util. Com.,* (1) 294 U. S. 63, 70; *West Ohio Gas Co.* v. *Public Util. Com.,* (2) 294 U. S. 79, and *Los Angeles Gas & Electric Corp.* v. *Ry. Comm.,* 289 U. S. 287, 304. The same is true, under state constitutions, by innumerable decisions of state courts; and there is no exception thereto.

If the jurisdiction exists and a hearing on due notice be had, then the result arrived at in such proceedings may be ever so erroneous on the merits, from the point of view of the defeated parties, yet no denial of due process will result, whether or not, as to the merits, the reviewing court agree with them. *Consolidated Edison Co. of New York* v. *National Labor Relations Board,* 95 Fed. (2d) 390, 395, 305 U. S. 197, 228-29; *Tisi* v. *Tod,* 264 U. S. 131, 133; *Kishan Singh* v. *Carr,* 88 Fed. (2d) 672, 679-80.

B. Refusal of the Supreme Court of Illinois to apply the rule of res judicata to the circuit court judgments entered in the former ouster suits, was no violation of due process.

The Supreme Court of Illinois held (and in so doing had the support of settled prior law, state and federal) that the first Geneseo decision was neither a bar or estoppel by judgment nor an estoppel by verdict (*Svalina* v. *Saravana,* 341 Ill. 236, 247-49; *Chicago Theo. Sem.* v. *People,* 189 Ill. 439,

451; *Cromwell* v. *Sac County,* 94 U. S. 351, 354-58); permitted a fresh trial in a proper forum after the dismissal (*Fleming* v. *Dillon,* 370 Ill. 325, 330-31; *Braude* v. *Wardy,* 340 Ill. 180, 186; *Peek* v. *Woman's Home Missionary Soc.,* 293 Ill. 337, 349-50; *St. Boniface R. C. Church* v. *Wolf,* 302 Ill. 204, 206; *Bierce* v. *Hutchins,* 205 U. S. 340, 346, 347; *Southern P. R. Co.* v. *Bogert,* 250 U. S. 483, 490); and could not have decided issues which were then moot or which might arise in future proceedings (*National Jockey Club* v. *Illinois Racing Com.,* 364 Ill. 630, 631-32; *Railway Express Agency* v. *Illinois Commerce Com.,* 374 Ill. 151, 156; *Ashwander* v. *Tennessee Valley Authority,* 297 U. S. 288, 324, 325). In so doing it acted in accordance with the rules of construction announced in *Rogers* v. *Hill,* 289 U. S. 582, 587.

On the merits, therefore, this question like that of the Commission's jurisdiction, is settled as a local matter. It is not a subject of federal concern unless by the prior decisions the petitioners acquired something, of a substantive character, to deprive them of which, by later orders or decisions, will violate or impair their rights under the federal constitution. Otherwise stated, have they a vested right, to be disturbed only at cost of bringing the Commission and the courts of Illinois into conflict with the Fourteenth Amendment, in that interpretation of the first Geneseo case upon which the Commission relied—and in the previous errors of the Supreme Court of Illinois, to the extent that decision was wrong?

A party to litigation may not acquire any such vested right in either decision or doctrine of the judicial department, especially in cases of this character.

As pointed out below (R. 218) the only fundamental question before the Supreme Court of Illinois was to which of two delegees the legislature had committed certain legislative powers in respect of the use of streets and public places and the rendering of utility service, within municipalities, by public utilities. Respondents claimed that petitioners had local franchises which had expired and which by their terms as well as by applicable statutes, ordinances and judicial decisions required petitioners to vacate and cease rendering utility service. Petitioners, on the other hand, contended that by virtue of section 55 of the utilities act they had what amounted to franchises from the state, under which the municipalities originally enfranchising them could not terminate their occupation and services at all, and under which even the Commission on the municipalities' complaint could so terminate only on affirmative proof, with the burden on respondents, that public convenience and necessity positively required them to go. In the first Geneseo case the Supreme Court of Illinois held that the Commission was a proper tribunal to settle the argument; and in these cases, that nothing else it said in that case was essential to its decision there.

How then could any right be vested in petitioners by the prior decisions or divested, *contra* Constitution, by the present ones? Whether the delegee of legislative authority be the Commission or the local municipal legislative body, that delegee was in either case dealing with a mere license to transact in a certain place a business affected with a public interest. Unless the grant be one in perpetuity there can be no vested right under such circumstances. The Supreme Court of Illinois has held repeatedly that a cer-

tificate of convenience and necessity confers no vested right. *R. R. Express Agency* v. *Com. Comm.*, 374 Ill. 151, 155-56. So long as there be notice and hearing, refusing or revoking a license or franchise is not a violation of due process. *Semler* v. *Ore. State Board of Medical Examiners*, 294 U. S. 608, 610-11; *State* v. *North*, 271 U. S. 40, 41-43; *Monamotor Oil Co.* v. *Johnson*, 3 Fed. Supp. 189, 202, 292 U. S. 86, 97; *Technical Radio Laboratory* v. *Federal Radio Com.*, 36 Fed. (2d) 111, 114.

It is even more fundamental, even elemental, that on expiration of a franchise the enfranchisee is not denied due process by being required to cease operating and remove its property. *Detroit United Ry.* v. *City of Detroit*, 229 U. S. 39, 45-46; *Scott County Road Co.* v. *Hines*, 215 U. S. 336, 339; *State* v. *Mo. Utilities Co.*, 339 Mo. 385, 96 S. W. (2d) 607, 618; *Detroit United Ry.* v. *City of Detroit*, 255 U. S. 171, 177.

Of course, petitioners cannot have any vested right in judicial decisions as such, especially if the highest state court shall later decide that they were misunderstood or erroneous. *Fleming* v. *Fleming*, 264 U. S. 29, 31, and *Tidal Oil Co.* v. *Flanigan*, 263 U. S. 442, 450-54, are among this Court's numerous decisions to this effect. The Supreme Court of Illinois has followed this construction, *Prall* v. *Burckhardt*, 299 Ill. 19, 42. Record herein, pp. 218-19.

Conclusion.

The decision of the Supreme Court of Illinois is correct and involves no error of law. That court has decided no federal question, substantial or otherwise, not heretofore determined by this Court, nor has it decided any such question in a way probably not in accord with applicable decisions of this Court. There is here no question justifying issuance of a writ of certiorari under Section 5 (a) of

Rule 38, or any of the other rules laid down to govern the granting of such writs. The petition should be denied.

Respectfully submitted,

JOSEPH L. SHAW,
Geneseo, Illinois,
RICHARD M. O'CONNELL,
Bloomington, Illinois,
CONRAD H. POPPENHUSEN,
ANAN RAYMOND,
THOMAS A. MATTHEWS,
A. L. STODDARD,
ROBERT Z. HICKMAN,
C. L. EMRICH,
Chicago, Illinois,
Attorneys for Respondents.

POPPENHUSEN, JOHNSTON, THOMPSON & RAYMOND,
Chicago, Illinois,
Of Counsel.

April 9, 1942.

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1941.

Nos. 1068 and 1069

ILLINOIS NORTHERN UTILITIES COMPANY,
Petitioner,

vs.

CITY OF GENESEO, ILLINOIS, AND ILLINOIS COMMERCE COMMISSION,
Respondents.

CENTRAL ILLINOIS ELECTRIC AND GAS COMPANY,
Petitioner,

vs.

VILLAGE OF HEYWORTH, ILLINOIS, AND ILLINOIS COMMERCE COMMISSION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

REPLY OF PETITIONERS TO BRIEF OF RESPONDENTS.

DAVID F. TABER,
Attorney for Illinois Northern Utilities Company, Petitioner.

CLAUDE A. ROTH,
Attorney for Central Illinois Electric and Gas Company, Petitioner.

ISHAM, LINCOLN & BEALE,
WILSON & MCILVAINE,
DIXON, DEVINE, BRACKEN & DIXON,
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MAY IT PLEASE THE COURT:

The questions which petitioners, relying upon the rights guaranteed to them by the due process clause of the Fourteenth Amendment, ask this Court to determine are stated on page 13 of the petition, as follows:

"Are the due process primary requirements of juris-

diction and hearing violated where the Supreme Court of Illinois, vested only with power to determine, on the basis of the record before the Commission, the reasonableness or lawfulness of the Commission's order, holds that the Cities and Villages Act grants power to Geneseo and Heyworth to oust petitioners, when that issue was not made by the record before the Commission, and under the then prevailing law could not have been entertained or determined by the Commission?

"Does the judgment of the Supreme Court sought to be reviewed deprive petitioners of their property rights vested in them by their judgments in the former ouster suits? If so, did the Supreme Court have jurisdiction?"

The brief of respondents does not meet these questions. Instead it substitutes (page 2) for these questions the following:

"Assuming for argument's sake that any federal question is presented, did the Supreme Court of Illinois deny petitioners due process,

"(a) By deciding judicially, on appeal from orders of an administrative body, that Illinois Commerce Commission has administrative jurisdiction and is charged with the administrative duty, under Illinois statutes and the undisputed facts in the record, to issue the orders prayed in the complaints before it,—petitioners in the same proceedings vigorously having invoked and asserted the jurisdiction of the Commission to deny such relief?

"(b) By refusing, in arriving at that decision, to apply the principle of *res judicata* to certain of its own alleged prior decisions and certain alleged prior adjudications of its circuit courts?"

The "Questions Presented" as revised in respondents' brief omit two important factors. First, they omit to mention that at the time these complaints were heard by the Commission the then prevailing law, repeatedly announced by the Supreme Court of Illinois itself, was that the Commission had no jurisdiction to entertain or deter-

mine such purely legal questions as (1) whether the special charter of Geneseo and the Cities and Villages Act conferred power of ouster upon Geneseo and Heyworth, respectively, (2) whether the Public Utilities Act repealed that grant, and (3) what rights were adjudicated between Geneseo and Northern and between Heyworth and Central in their respective prior ouster suits.

Second, the "Questions Presented," as revised in respondents' brief, omit to mention that the Supreme Court of Illinois in reviewing an order of the Commission has only the jurisdiction conferred upon it by the Public Utilities Act to determine, on the basis of the record before the Commission, the reasonableness or lawfulness of the Commission's order.

In the specification of "Questions Presented" respondents' brief treats the power to examine judgments and determine the rights thereby adjudicated and the power to determine whether the Cities and Villages Act granted power of ouster and whether such grant was repealed by the Public Utilities Act as matters which were within the "administrative jurisdiction" and "administrative duty" of the Commission to determine and enforce by order. But respondents' brief cites no authority that the examination of a judgment and the determination of the rights therein adjudicated fall within "administrative jurisdiction" or "administrative duty" or partake of any administrative aspect whatsoever. In subsequent sections of respondents' brief the purely judicial nature of these questions is recognized. Thus, the brief of respondents states on page 2 that: "Each of these cases involved the right and power, under the Illinois statutes, of an Illinois municipality to control and license the entry upon and occupation of streets * * * by an electric public utility * * * the franchise or license granted by the municipality having expired * * *."

It is obvious that there is a fundamental difference in the nature of the jurisdiction requisite to a determination of whether a municipality has the "right and power" to oust a utility and the nature of jurisdiction requisite to a determination of whether, on grounds of public convenience and necessity, the utility should discontinue service in a municipality. Because petitioners joined issue with respondents on the question of public convenience and necessity does not mean, as claimed in the brief of respondents (pp. 7-10, 18), that petitioners by their answers filed with the Commission joined issue on and invited determination by the Commission as to whether the "right and power" existed in respondents to oust petitioners. The question of the "right and power" of respondents to oust petitioners was not, and could not have been, an issue before the Commission. Petitioners neither by their answers filed with the Commission nor otherwise invited the Commission to decide, or submitted to the Commission for consideration, the question of the "right and power" of respondents to oust petitioners. Nor did petitioners call upon the Commission to determine what matters were adjudicated in their ouster suits or the extent to which those adjudications were *res judicata.*

Denial that the Commission has jurisdiction to decide purely judicial questions cannot invoke exercise of jurisdiction which is denied to exist. Denial of the existence of jurisdiction in the Commission to determine these legal issues is not only a denial of power in the Commission to either say "Yes" or "No" to the question of the existence in respondents of the "right and power" to oust petitioners, but is also a denial of the jurisdiction to entertain that question.

The brief of respondents states on page 13 that petitioners have taken the position that by virtue of the decision in the first Geneseo case they have "acquired vested rights to continue to occupy the streets of Geneseo and

Heyworth respectively; * * *." The brief of respondents further states on page 15 that "The Commission by basing its decision on the question of public convenience, necessarily held adversely to the petitioners on their claim of vested rights." Both of these statements misconstrue the position taken by petitioners in their answers filed with the Commission. Petitioners did not claim before the Commission that they had a vested right "to remain undisturbed" in the municipalities. What petitioners claimed before the Commission was that they had the right to have the Commission determine on the criterion of public convenience and necessity whether their services in respondent municipalities should be discontinued and that if petitioners were ordered to discontinue their services otherwise than on the grounds of public convenience and necessity petitioners would be deprived of their property without due process of law (R. 12, 86).

The statement on page 23 of respondents' brief that "Both sides came before the Commission proclaiming that the question involved was the ouster of the utility under the admitted facts in each case," is not correct. Neither side proclaimed that such a question was involved. Any suggestion or claim on the part of respondents to the "right and power" of ouster existing in respondents was explicitly negatived by respondents themselves in the following paragraph contained in each of their complaints before the Commission:

> "14. That the Supreme Court of Illinois decided in the case of *City of Geneseo* v. *Illinois Northern Utilities Company*, 363 Ill. 89, that the power to compel a utility whose franchise expired, to vacate the public streets of a municipality, has been withdrawn from such municipality and has been vested in the Illinois Commerce Commission." (R. 4, 75.)

Respondents did not make the question of the existence in them of power of ouster an issue in the proceedings before

the Commission by affirmatively asserting in each of their complaints that such power had been withdrawn from them and had been vested in the Commission.

The records before the Commission admit of no doubt that the sole issue entertained and decided by that body was whether, on the criterion of public convenience and necessity, the petitioners should be required to discontinue their electric service in and to remove their electric facilities from the respondent municipalities.

The decision of the Supreme Court of Illinois in the instant case speaks for itself. It definitely shows that the court disregarded the action of the Commission as regards public convenience and necessity and instead determined three legal issues: (1) that the Cities and Village Act granted power to Geneseo and Heyworth to oust Northern and Central, (2) that the Public Utilities Act did not repeal that grant, and (3) that the former Geneseo case did not adjudicate that Geneseo and Heyworth lacked power to oust Northern and Central.

The brief of respondents does not dispute the statements and supporting authorities in petitioners' brief (pages 20, 21) that up to the date of the present decision of the Supreme Court of Illinois the provisions of the Public Utilities Act had been repeatedly construed to contain no grant of power to the Commission to entertain or determine a judicial question; that up to the date of the present decision of the Supreme Court of Illinois that court had held that the interpretation of statutes to determine the existence and extent of powers granted and whether a later act of the legislature repealed an earlier one, were judicial functions susceptible of performance only by the exercise of judicial power. Under such state of the law, as declared by the Supreme Court of Illinois itself, there existed no jurisdiction in the Commission at the time the present complaints were pending before it to entertain or deter-

mine these judicial questions, and no default may be charged against petitioners for failing to plead and prove the defense of *res judicata* or such other defenses as petitioner might have presented had the proceedings been in a court of law or equity. The primary due process requirements of competent jurisdiction and an opportunity to present defenses were not available when the proceedings were pending before the Commission.

The brief of respondents does not explain to this Court wherein the Commission has jurisdiction to examine the judgments and determine the rights adjudicated by such judgments, or wherein the Commission has jurisdiction to construe the statutes and determine the powers granted or repealed by such statutes, nor does the brief of respondents explain to this Court wherein the Supreme Court of Illinois in reviewing an order of the Commission on the basis of the record before the Commission acquired jurisdiction to determine any of these legal questions.

Such defenses as petitioners had to these three above mentioned legal issues, whether meritorious or not, petitioners were entitled to present to a tribunal of competent jurisdiction. Since the opportunity was wanting of presenting these defenses to the Commission and since, in reviewing an order of the Commission, the Supreme Court of Illinois is confined to the record made before the Commission, petitioners have had no opportunity of presenting their defenses.

On page 10 of the brief of respondents it is stated that "The validity and construction of orders of state administrative bodies, and the extent to which prior decisions of state courts are to be *res judicata* in subsequent litigation, are matters of local law, on which the decisions of the highest state court are controlling." Petitioners do not deny the soundness of that statement provided the requirements of jurisdiction and an opportunity to present

defenses have been met. The above statement from respondents' brief simply begs the question. Petitioners attack the decision of the Supreme Court of Illinois because the court reached beyond the scope of its jurisdiction and the scope of the record before it and decided issues outside of the record and concerning which petitioners had had no opportunity to present their defenses.

At the earliest opportunity available to them petitioners specifically set up and claimed before the Supreme Court of Illinois that it had acted beyond its jurisdiction and without affording petitioners a hearing in violation of the due process clause of the Fourteenth Amendment. The Supreme Court of Illinois adhered to its decision and in so doing decided the federal due process questions against petitioners.

On page 21 of respondents' brief it is stated that "There is nothing whatever in or outside of this record to justify the attempted implication that these petitioners, or anyone else in like situation, ever have sustained any legal detriment whatever in reliance on the first Geneseo case or the 1936 circuit court decisions." Petitioners admit that the record contains no such showing but petitioners assert that had the opportunity been given to them, as for example had respondents instituted second ouster suits before the circuit courts of Illinois, petitioners in support of the court's consideration of the principle of *stare decisis* could and would have presented evidence establishing that serious detriment would result to petitioners on account of expenditures made by them and obligations incurred by them in reliance on the first Geneseo case. That evidence was not presented to the Commission because it would not have been relevant to the issue before the Commission.

The brief of respondents states on page 15: "The Su-

preme Court adopted a different standard from that set up by the Commission. The latter body had held that unless public convenience *demanded the ouster* of a utility, upon the expiration of its franchise, it *could not* be ousted. The Court held that unless public convenience *demanded the retention* of the utility, it *must* be ousted when its local franchise expired." This is an incorrect statement both of what the Commission held and of what the Supreme Court held. The Commission held that its determination of whether utilities should discontinue operations "should be made in accordance with the just and reasonable requirements of public convenience and necessity, that is, whether or not the respondent public utility now serves a useful purpose in the City of Geneseo as contemplated by the Public Utilities Act" (R. 50-51). The Supreme Court held that Geneseo and Heyworth had the absolute power to oust Northern and Central. That is one of the questions which petitioners claim the court was without jurisdiction to decide and concerning which they have had no opportunity to present their defenses.

If the contentions of respondents be sound (see page 11 of their brief) that certain sections of the Illinois Public Utilities Act conferred upon the Commission jurisdiction to determine (1) the legal power of Geneseo and Heyworth to oust petitioners, (2) whether or not such power had been repealed by the Public Utilities Act, and (3) what rights had been adjudicated in the former ouster suits, then with respect to such matters the Commission would have concurrent jurisdiction with the circuit courts of Illinois.

The following illustration will show the unsoundness of such a view. Suppose a plaintiff property owner brings an ejectment suit against a defendant electric utility to compel the removal of an electric line from property which

plaintiff claims to own and over which the defendant utility claims to hold an easement from plaintiff's grantor. A judgment in the ejectment suit is rendered by the court against the plaintiff. Plaintiff then files a complaint with the Commission praying that the utility be ejected. The Commission, if respondents' contentions are valid, would have jurisdiction to determine (1) whether or not plaintiff had title to the property, (2) whether or not the easement from plaintiff's grantor was valid, and (3) whether or not the judgment in the prior ejectment suit was a bar to the complaint. If the Commission held in such case, as it would have been compelled to do under the then prevailing decisions of the Supreme Court of Illinois, that it had no power to entertain the complaint, then the complaining property owner could, under the views advanced by respondents, carry an appeal from the orders of the Commission up to the Supreme Court of Illinois and that court could, notwithstanding the restraints of due process, determine that the complaining property owner had title, that the easement was invalid, and that the judgment in the prior ejectment suit did not bar complainant from again litigating the issue. The illustration is analogous to the situation in the present case. Clearly the contentions of respondents in this regard must fall of their own weight.

In the foregoing reply, petitioners have not undertaken to answer in detail, nor to untangle, the somewhat confused arguments set forth in respondents' brief. The petition for certiorari, petitioners believe, states in simple and straight-forward manner the points in issue and the grounds for review. Petitioners submit that respond-

ents have failed squarely to meet or answer those issues and grounds.

Respectfully submitted,

DAVID F. TABER,
of Chicago, Illinois,
Attorney for Illinois Northern Utilities Company, Petitioner.

CLAUDE A. ROTH,
of Chicago, Illinois,
Attorney for Central Illinois Electric and Gas Company, Petitioner.

ISHAM, LINCOLN & BEALE,
Chicago, Illinois,

WILSON & MCILVAINE,
Chicago, Illinois,

DIXON, DEVINE, BRACKEN & DIXON,
Dixon, Illinois,

HENRY WATERMAN,
Geneseo, Illinois,

GOTTLIEB & SCHWARTZ,
Chicago, Illinois,
Of Counsel.

April 13, 1942.